



DEPARTMENT OF THE NAVY

BOARD FOR CORRECTION OF NAVAL RECORDS

2 NAVY ANNEX

WASHINGTON DC 20370-5100

TRG

Docket No: 4270-99

13 July 2000

[REDACTED]

Dear [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 6 July 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the letter from your commanding officer dated 6 August 1999 and the advisory opinion furnished by Headquarters Marine Corps dated 3 December 1999, copies of which are enclosed.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice.

The record shows that you received nonjudicial punishment for driving on base with suspended driving privileges and driving without insurance. The punishment imposed was a reduction in rank from SGT (E-5) to CPL (E-4).

In your application you contend that you were not driving on base suspension, but your wife had parked your car near your work station so that you could fix a tire. However, you admitted that your automobile insurance had lapsed. You point out that the traffic hearing officer dismissed the charge of driving on base suspension and, in effect, it was improper for the commanding officer to punish you for that offense. You contend that a reduction in rank for the remaining offense of a temporary lapse in your insurance was too severe.

The advisory opinion states that the commanding officer had the authority to find you guilty of driving on base suspension and a "contrary finding by a different authority, on possibly different evidence (was) irrelevant." Concerning the charge of driving without insurance, the advisory opinion points out that you were

improperly found guilty of violating the Marine Corps order requiring insurance since this was a policy directive that was not punitive in nature. However, the advisory opinion concludes that you were not prejudiced by this error because you were still found guilty of driving on board the air station while knowing that your driving privileges were suspended.

The Board reviewed the Air Station Order 5101.6L, with changes, concerning revocation and suspension of driving privileges and traffic hearing procedures. That order is punitive in nature and allows disciplinary action for driving on base suspension and driving without insurance. The order specifically states that actions taken by the traffic hearing officer do not relieve commanding officers of their responsibility for administrative or disciplinary action.

Therefore, the Board substantially concurred with the comments contained in the advisory opinion as it pertains to the offense of driving while on base suspension. Concerning the charge of driving without insurance, the Board notes that the air station Order was punitive in nature and if it had been properly cited you could have been disciplined for that offense. Therefore, the Board concluded that the error was harmless and you were properly disciplined for driving without insurance.

Accordingly, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures



DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070
JAM4
03 DEC 1999

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF CORPORAL [REDACTED]
U.S. MARINE CORPS

Ref: (a) Article 15, UCMJ

1. We are asked to provide an opinion on Petitioner's requests for removal of the record of the nonjudicial punishment (NJP) imposed on 31 March 1999, and for restoration of grade.

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background

a. On 31 March 1999, Petitioner accepted NJP under reference (a) for violating Articles 92 and 123a of the UCMJ. Specifically, the charges alleged that Petitioner violated two lawful orders by wrongfully operating a motor vehicle on board Marine Corps Air Station (MCAS) Cherry Point, North Carolina, with a suspended driver's license and without the minimum required insurance. He was also charged with wrongfully uttering two checks. The NJP Authority dismissed the check offenses but awarded punishment for the disobedience offenses. Petitioner was awarded reduction to corporal (E-4). Petitioner appealed the NJP, but the appeal was denied. On 25 March 1999, Petitioner appeared in Military Traffic Court for driving with a suspended license and without adequate insurance. The presiding magistrate dismissed the driving with a suspended license charge.

4. Analysis

a. Petitioner maintains relief is warranted because he was denied the opportunity to present evidence at the NJP hearing on the charge of operating a vehicle with a suspended license. Petitioner's assertion is contradicted by the record of the NJP, which indicates that he was given the opportunity to present additional evidence at the NJP hearing but declined.

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF CORPORAL [REDACTED]
U.S. MARINE CORPS

b. Petitioner also argues that the NJP record should be removed for that charge because, prior to the NJP hearing, the magistrate dismissed the charge in traffic court. This argument is without merit. The NJP Authority considered the available evidence and was convinced by a preponderance of the evidence that each element of the offense was satisfied. There is no indication that the NJP authority abused his discretion in punishing Petitioner for that offense. A contrary finding by a different authority, on possibly different evidence, is irrelevant.

c. We note, however, that Petitioner should not, as a matter of law, have been punished for violating MCO 5110.1C by wrongfully operating a motor vehicle without the minimum required insurance because the order is not punitive in nature. The stated purpose of MCO 5110.1C is to set policy, responsibilities, and procedures for motor vehicle traffic supervision on military installations. Policy statements are not enforceable as punitive regulations. For an order to be punitive, it must contain mandatory terms, and the punitive nature of the order must be clearly and unambiguously stated. In contrast, Air Station Order 5101.6L, which prohibits wrongfully operating a vehicle with a suspended driver's license, does specifically state that it is punitive. Petitioner could properly be punished for driving with a suspended license. We do not believe, however, that this error prejudiced Petitioner. The gravamen of his misconduct was driving on board the Air Station--as a Sergeant--while knowing his driving privileges were suspended.

5. Conclusion. Accordingly, for the reasons set forth above, we recommend denial of the requested relief.

M. W. Fisher, Jr.

M. W. FISHER, JR.
Head, Military Law Branch
Judge Advocate Division



UNITED STATES MARINE CORPS

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MARINE CORPS AIR STATION, CHERRY POINT, NC 28533-0052

4270-99

IN REPLY REFER TO:

5800

CO

6 Aug 99

From: Commanding Officer, Marine Aviation Logistics Squadron 14
To: Chairman, Board of Correction of Naval Records
2 Navy Annex, Washington DC 20370-0052

Subj: NONJUDICIAL PUNISHMENT DOCUMENTATION IN THE CASE OF
CORPORAL [REDACTED]

Ref: (a) Chairman, Board of Corrections ltr AEG:jdh, Docket No:
4270-99 of 27 July 1999

Encl: (1) Unit Punishment Book for Nonjudicial Punishment of
990331
(2) Report of Violation of the Uniform Code of Military
Justice
(3) Accused's Notification and Election of Rights
(4) Suspect's Rights Acknowledgement/Statement
(5) Office Hour Proceedings
(6) Maximum Punishment Worksheet
(7) Office Hours Accused's Acknowledgment of Appeal
Rights
(8) Sergeant [REDACTED] Request for Appeal
(9) First Endorsement on Sergeant Banks' Appeal
(10) Second Endorsement on Sergeant Banks' Appeal
(11) Memorandum of Review of 16 April 99
(12) Third Endorsement on Sergeant [REDACTED] Appeal
(13) Punitive Reduction Order of 26 April 99
(14) Marine Corps Air Station Cherry Point Driving Record
(15) State of North Carolina Driving Violations

1. In accordance with the reference, enclosures (1) through (15) are submitted to be used in your review of Corporal [REDACTED] Nonjudicial Punishment.

2. Enclosures (1) through (13) clearly indicate that the Nonjudicial Punishment Process, to include the appeal, was conducted in accordance with Part V of the Manual for Courts-Martial, 1998 edition. Enclosure (1) shows that the Nonjudicial Punishment was held on 31 March 1999. The date was not changed to reflect his allegation of a "10 working day" being met. There is no such requirement for Nonjudicial Punishment. Corporal [REDACTED] submitted his appeal within the five day requirement and the appeal was processed accordingly. Enclosures (7) through (12) reflect the appeal process.

3. Corporal [REDACTED] alleges that he was not given a chance to explain or use records at the Nonjudicial Punishment. Enclosure

AUG 18 1999

(5) indicates that he presented evidence regarding the insufficient funds. After reviewing this evidence, I found him Not Guilty of violating Article 123 of the UCMJ. I also reviewed the blue notebook that he submitted as matters in his defense. I also heard his testimony, to include a verbal statement from his spouse. I considered all of that information in my decision. I also considered his driving record since being assigned to this duty station. Enclosures (14) and (15) show that he has a history of lapsed insurance and driving on both state and station suspension. During the office hours, Corporal [REDACTED] explained that he now had renewed his insurance and he did not understand why I should hold him accountable for operating a private vehicle without insurance. I explained to him that, at the time the Military Police wrote the tickets, the insurance had expired and he was still operating the vehicle. His immediate supervisor, Master Sergeant [REDACTED], wrote the charge sheet as shown in enclosure (2). Corporal [REDACTED] was treated no differently than any other Marine who has appeared before me for Nonjudicial Punishment. I considered the nature of the offenses, his record, the need for good order and discipline, and the effect the punishment would have on his career.

4. I do not understand why Corporal [REDACTED] alleges that he was reduced in rank due to a vendetta. The Websters Dictionary defines vendetta as "an act or attitude motivated by vengeance." I treated Corporal [REDACTED] with the same dignity and respect that I treat my other 1,000 Marines; however, I did hold him accountable for violating the Uniform Code of Military Justice.

5. There is an inconsistency in Corporal [REDACTED]' application. In Block 7.a. (counsel) he lists his spouse. His spouse is not a legal counsel.

6. Please do not hesitate to contact me if you have further questions, DSN 582-2039.

[REDACTED]